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No. _____

In The

Supreme Court of the United States

October Term, 1996

Laurie Isaac Broad, for himself and all others who are similarly situated,

Petitioners,

v.

Sealaska Corporation, Sealaska Elders' Settlement Trust, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When finding an implied preemption, is the test being applied by the Ninth Circuit in conflict with the preemption analysis being employed by the other circuits?

When finding an implied preemption, should a court first apply the narrowest test (is there point-by-point *conflict* preemption?) before resorting to a broader test (is there *field* preemption?)?

Should implied preemptions be disfavored – at least where Congress has installed an *explicit* preemption elsewhere in the same statute?

Does the Ninth Circuit err in its use of the negative pregnant in deciding that the statutory prohibition against one form of discrimination amounts to a statutory authorization for any other form of discrimination (i.e., amounts to permission to commit any form of discrimination that is not expressly prohibited by the statute)? In other words, is Judge Posner correct: "Not every silence is pregnant"?*

---

* *State of Illinois, Department of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983) (Posner, J.).

LIST OF PARTIES**

Petitioner, Claimants:	Respondent, Defendants:
Laurie Isaac Broad	Sealaska Corporation
Marsha Simonds	Sealaska Elders'
Julie Wigg	Settlement Trust
Larry Taylor, Jr.	Patrick Anderson
Marc Simpson	Charles Carlson
Rebecca Simpson	Joseph Demmert, Jr.
Alora J. Winchester	Embert Demmert
Emily Gotardo	Raymond Demmert
Barbara Crabtree	Jim Edenso
Angie Doak	Clarence Jackson, Sr.
Royann Churchill	Marlene A. Johnson
Leonard Valezquez	Albert Kookeesh
Arlene Bell Hanson	Ethel Lund
Victor Carl Davis, Jr.	Carlton Smith
	Richard Stitt, Sr.
	Ralph Strong
	Alan Williams
	Rosita Worl
	Marjorie Young

** Pursuant to Supreme Court Rule 29.6, petitioners state that Sealaska Corporation has no parent company and has no nonwholly owned subsidiary.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Laurie Isaac Broad, and the class of shareholders whom he seeks to represent, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit that was entered in this case on 16 May 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 85 F.3d 422 (1996). The dissent is found at *id.*, 432-35. Both the majority and dissenting opinions are set out in the appendix, below. ("App.").

The order denying the petition for rehearing with suggestion for rehearing *en banc* is also included in the appendix.

The memoranda opinions of the United States District Court for the District of Alaska (H. Russell Holland, J.) have not been reported. There are two such memoranda, one dealing with statutory issues and the other addressing the constitutional issues. Both opinions are reprinted in the appendix, below.

JURISDICTION

This lawsuit was filed in a state court and later removed to federal court. It was filed in the Superior Court of the State of Alaska at Petersburg on 30 September 1992, and was removed to the District Court for the District of Alaska by a timely notice of removal that was filed on 28 October 1992.

After the parties had filed cross motions for summary judgment, the district court granted Sealaska's motion for summary judgment and dismissed the case by orders signed on 2 December 1993 (Motion for Summary Judgment) and 4 March 1994 (Fifth Amendment Issues), which were filed by the deputy clerk in Juneau on 6 December 1993 and 7 March 1994, respectively. A final judgment of dismissal with prejudice was entered on 14 March 1994, and on 17 March 1994 an appeal was noted to the Court of Appeals for the Ninth Circuit.

After oral argument in Anchorage on 7 August 1995, the Court of Appeals affirmed the district court's decision in an opinion issued on 16 May 1996. One judge, Judge Andrew Kleinfeld of Fairbanks, Alaska, dissented.

By order dated 11 July 1996, two members of the panel voted to deny the petition for rehearing and to reject the suggestion for rehearing *en banc*. Judge Kleinfeld would have granted the petition for rehearing and accepted the suggestion for rehearing *en banc*. No vote was taken on the suggestion for rehearing *en banc*. The mandate was issued on 19 July 1996.

Petitioner submitted a timely application to extend the time for filing this petition for writ of certiorari, and the application was granted by order of Circuit Justice O'Connor on 2 October 1996. That action extended the deadline for filing this petition to and including 8 November 1996, the date upon which it is being filed.

The jurisdiction of the Supreme Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes principally involved in this case are parts of the Alaska Native Claims Settlement Act [ANCSA]: ANCSA § 7(h)(1)(A) [43 U.S.C. § 1606(h)(1)(A)] Settlement Stock of Regional Corporation; *and* ANCSA § 39 [43 U.S.C. § 1629e] – Settlement Trust Option.

> 43 U.S.C. § 1606(h)(1) RIGHTS AND RESTRICTIONS. –
>
> (A) *Except as otherwise expressly provided* in this Act, Settlement Common Stock of a Regional Corporation shall –
>
> (i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;
>
> (ii) permit the holder to receive dividends or other distributions from the corporation; and
>
> (iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

(emphasis added). In explaining why there is no conflict between state and federal law (and thus no need for a preemption analysis) the dissenting opinion of Judge Kleinfeld relied in part upon an Alaska statute, AS 10.06.960(f). The text of all three statutes is set out in the appendix, below.

STATEMENT OF THE CASE

This is a case about corporate discrimination in the payment of dividends: Sealaska Corporation pays extra dividends to some shares but not to others of the same class of stock.[1] Only shareholders over the age of 65 years are paid the extra dividend of $2,000.

No court has ever approved a discriminatory dividend. Centuries of corporate law require that a corporation pay its dividends in a uniform and pro rata manner to all shares of the same class of stock. But the majority opinion has approved a discriminatory dividend – and opened the door to a tidal wave of corporate discrimination – doing so on the most slender reed: an *implied preemption* of a monolithic rule of state law by a weak, amorphous federal statute.

The majority resorted to broad field preemption analysis for its finding of an implicit preemption – even though other parts of the same statute contain clear and *explicit* preemptions of the same body of state corporate law.

---

[1] When a corporation makes distributions and pays dividends to shareholders, it must do so on a pro rata basis and without discrimination. Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF.L.REV. 1072, 1076-78 (1983) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference."). *See also*, FLETCHER, 11 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5352 (1995 rev'd vol.); CLARK, CORPORATE LAW, § 1.2, 13 (1986); HENN AND ALEXANDER, LAWS OF CORPORATIONS, § 324 (3d ed. 1983); 18B AMJUR2D, *Corporations*, § 1220 (1985).

The majority found a negative pregnant in the federal statute's prohibition against corporate discrimination in favor of management. So it discarded the state law rule and instead allowed discrimination in favor of some (non-management) shares to the detriment of other shares of the same class of stock. This negative pregnant relies upon one of the most criticized of statutory "maxims," *expressio unius est exclusio alterius.*

The majority opinion ignored the recent pronouncements of this Court on two topics that are dispositive here. *First,* this Court has declined to find an implied preemption where an alternative construction will avoid it. *Second,* this Court has rejected the *exclusio unius* rule and its negative pregnant corollary; instead it has interpreted statutes by looking to the entire law, to its objects and to its underlying policy.

The dissenting opinion (authored by Alaska's sole member of the Ninth Circuit) explains why this case is so important to Alaska. When Congress adopted the Alaska Native Claims Settlement Act [ANCSA], it appropriated almost a billion dollars and 44 million acres of land to all of Alaska's natives to be shared on a uniform basis. ANCSA is the quintessential expression of the pro rata sharing of a community asset. The statute is full of safeguards that require equal treatment of all Natives and that prevent the sort of selfish redistribution of the settlement proceeds that are at issue in this case.

This case is of great importance to the State of Alaska and to its Native peoples. More than 200 Alaska Native

corporations will be affected by this case. These corporations have received almost one billion dollars of federal money and title to an area the size of Missouri and Kentucky combined.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS – THEY ARE SPLIT ON PREEMPTION ANALYSIS

(A) In Broad v. Sealaska Corp. and in other decisions, the Ninth Circuit resorts to overly broad field preemption when more narrow conflict preemption would suffice.

In analyzing preemption questions, federal courts overlay a three-pronged template on the area in which federal and state law allegedly collide. The first prong tells the court to search out an express preemption provision in the federal enactment. Finding no express preemption provision, a federal court then examines the record for implied preemption. In turn, implied preemption has two prongs: field preemption, in which Congress can be said to have occupied the field, and narrower conflict preemption, in which the proponent demonstrates that compliance with both the federal enactment and state statutory or common law is impossible. *See e.g., Gustafson v. City of Lake Angelus*, 76 F.3d 778 (6th Cir. 1996) (three types of preemption exist).

Here in the instant case, the Ninth Circuit majority ostensibly found conflict preemption but rendered a decision that, by permitting all forms of discrimination among shareholders, constitutes field preemption. Thus, Judge Hall found that the Settlement Trust provision's express prohibition of utilization of a trust to favor corporate officers or directors usurps state law, thus by its further silence permitting all other forms of discrimination among shareholders. *See* 95 F.3d 426. *But see id*, at 433 (Kleinfeld, J., dissenting) (Congress may have "felt that

for other risks [of discrimination] state law protections were adequate"; "The provision prohibits one kind of discrimination, and leaves it to other federal and state laws to prohibit others.").

By overbroad use of the maxim *expressio unius est exclusio alterius*, the majority found that Congress had preempted state law from a role in policing discrimination among shareholders. The dissent recognizes this magic trick for what it is: field preemption masquerading as conflict preemption. *See id.* at 432 (if federal and state laws policing discrimination are read in harmony, "[t]hat means that there can be no preemption of the field."). *Cf.* The majority opinion at 426 ("When federal and state law actually conflict, the state law is preempted").

The consequence of the majority's holding is that "[v]irtually any transfer of corporate assets," dissent at 433, even the most discriminatory, can take place so long as officers and directors are not favored and a corporate resolution states that the discriminatory action "promotes the . . . welfare of its beneficiaries" or "preserves the heritage and culture of Natives." *Id.*

(B) In other decisions, the Ninth Circuit also has engaged in broad field preemption analysis when narrower, point-on-point conflict preemption analysis would suffice.

For example, in *Chamber of Commerce of U. S. v. Brandon*, 64 F.3d 497 (9th Cir. 1995), the Court struck down a California county's prevailing wage ordinance. The court did not first engage in any conflict preemption analysis, finding broad field preemption by concluding that such

ordinances are "incompatible with the goals of NLRA" (National Labor Relations Act).

(C) Other courts of appeal correctly examine claims of preemption point by point, first using conflict rather than field preemption when the more delicate tool is an adequate means of resolving the issue before them.

Exemplary is the Sixth Circuit. For example, in *Downhour v. Somani*, 85 F.3d 261, 265 (6th Cir. 1996), the court analyzed whether Medicare preempts a state enactment regulating the billing practices of physicians. The court first noted that "[t]here has traditionally been a presumption against federal preemption of state law" and that "if the subject matter of the state statute is one within the state's traditional powers," as is regulation of a corporation's internal affairs, "the party arguing federal preemption must show that preemption was the 'clear and manifest purpose of Congress.' " With this as the correct lodestar, and engaging in careful actual conflict analysis, the court found no preemption.

Similar recent cases include *Gustafson, supra* (6th Cir. 1996) (holding that although the Federal Aviation Act may preempt regulation of navigable airspace, the act does not preempt regulation of landing sites – local authority could regulate seaplane landings), and *Interstate Towing v. City of Cincinnati*, 6 F.3d 1154, 1157-59 (6th Cir. 1993) (provision of the Motor Carrier Safety Act did not preempt city ordinance requiring licensure of tow trucks, first engaging in conflict and then field preemption analysis).

And the First Circuit also has employed a more disciplined approach to preemption analysis than used by the Ninth Circuit. Writing for the First Circuit, Justice Breyer explains:

> Pre-emption law cautions us against finding that a congressional act pre-empts a state law through silence. The negative presumption is even stronger when the state law at issue creates a remedy unavailable under federal law. And it is virtually conclusive when Congress, in the very statute at issue, *explicitly* pre-empts *other* state law remedies but not the remedy at issue.

Schafer v. American Cyanamid Co., 20 F.3d 1, 6-7 (1st Cir. 1994) (Breyer, C.J.) (emphasis in the original; citations to five U.S. Supreme Court cases omitted); *see also, Greenwood Trust Co. v. Commonwealth of Mass* , 971 F.2d 818, 823 (1st Cir. 1992) ("In recent days, the High Court has made it pellucidly clear that, whenever Congress includes an express preemption clause in a statute, judges ought to limit themselves to the preemptive reach of that provision without essaying any further analysis under the various theories of implied preemption."). Had the Ninth Circuit employed such discipline in developing its own preemption doctrine, it would have noted that *Broad v. Sealaska* involves a statute that is full of explicit preemptions of Alaska law – and thus the majority would not have strained to "find that ANCSA implicitly preempts state law." 85 F.3d at 426.

The dichotomy between groups of courts of appeals is illustrated by their recent treatment of the question of whether the Medical Device Amendments (MDA) to the Federal Food and Drug Act preempt state law product

liability, design negligence, negligence, implied warranty and similar claims. The Third and Seventh Circuits apply broad field preemption analysis, holding that the MDA has occupied the field. *See, e.g., Mitchell v. Collogen Corp.*, 67 F.3d 1268 (7th Cir. 1995) (MDA preempts state claims concerning Zyderm substance used to eliminate skin wrinkles); *Michael v. Shirley, Inc.*, 46 F.3d 1316 (3rd Cir. 1995) (MDA preempts claims about defective artificial heart valve with the exception of express warranty claim peculiar to the case sub judice).

By contrast, the Fifth, Sixth and Eighth Circuits apply allegation-by-allegation conflict preemption analysis in MDA cases. These courts find that some state law claims may coexist with MDA while others may not. *See, e.g., Jacobs v. E.I. DuPont Nemours & Co.*, 67 F.3d 1219 (6th Cir. 1995) (MDA does not preempt claims against raw materials manufacturer); *Feldt v. Mentor Corp.*, 61 F. 3d 431 (5th Cir. 1995) (some claims concerning faulty implant device survive conflict preemption analysis while others do not); *National Bank of Commerce v. Kimberly Clark-Corp.* 38 F.3d 988 (8th Cir. 1994) (toxic shock syndrome state law case not preempted by the MDA).

Indeed, with regard to faulty heart pacemaker claims against the same defendant, two circuits reach the opposite result. *Compare Lohr v. Medtronic, Inc.*, 56 F.3d 1335 (11th Cir. 1995) (MDA does not preempt all state law claims), *with Mendes v. Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994) (MDA occupies field).

II. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

(A) By instructing lower federal courts first to attempt conflict preemption analysis rather than broad field preemption, this Court will insure that lower federal courts will find only the limited preemption that is necessary to the outcome in cases being adjudicated.

Indeed, this Court could make express a principle that – as in finding state and city statutes or ordinances unconstitutional, and in preemption cases as well – lower federal courts must rest their preemption decisions on the narrowest grounds possible. This Court has come close to saying so on several occasions. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963) (requiring "actual conflict with the law of the State"); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978) (avoiding preemption by choice of other grounds). Prof. Tribe's comment on the latter noted "the basic teaching of the *Atlantic Richfield* decision is that state pressure to act in derogation of a federal statutory scheme is not to be inferred lightly." TRIBE, AMERICAN CONSTITUTIONAL LAW, 487 (2nd ed. 1988).[2]

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[2] Other such cases include: *New York Blue Cross v. Travelers Ins.*, 514 U.S. ___, 131 L.Ed.2d 695, 115 S.Ct. ___ (1995); *Wisconsin Public Intervenor v. Mortier,* 115 L.Ed.2d 532, 111 S.Ct. 2476 (1991); *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 95 L.Ed.2d 67, 107 S.Ct. 1637 (1987); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984); *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 576 L.Ed.2d 91, 98 S.Ct. 2207

Resort to the expansive field preemption doctrine is not compatible with the underlying constitutional doctrine and the nature of federalism. One commentator notes "the doctrine of field preemption is inconsistent with modern federalism and its presumption that states retain concurrent powers." Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORN.L.REV. 767, 812 (1994).

In the instant case, Congress provided that Alaska Native Corporations could favor elder shareholders by formally amending articles of incorporation and issuing to those shareholders "elder preference stock." *See, e.g.* 85 F.3d at 434 (Kleinfeld, J., dissenting) (describing ANCSA § 7(g)(1), 43 U.S.C. § 1606(g)(1). *See also* § 1606(g)(2).

This provision also conflicts with both the statutory and common law of corporations that mandate equal treatment of all shares of the same class of stock, especially in the matter of dividends and distributions. But the provision, and the narrow preemption inherent therein, have the virtue of repealing the normal anti-discrimination rule only to the narrowest extent possible. In contrast, the Ninth Circuit majority opinion allows a broad, open ended repeal of the anti-discrimination rule, so long as corporate officers and directors are not the sole beneficiaries of the discrimination.

(1978); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 576 L.Ed.2d 91, 98 S.Ct. 2207 (1978).

(B) This Court should require a first resort to conflict preemption analysis, coupled with a careful analysis of the structure of federal statutory enactments, to aid federal courts in deciding cases on the narrowest preemption grounds possible.

Reasons for such a rule are found right here in the instant case. This Court has directed courts to find evidence of preemptive intent by Congress in the "text and structure of the statute at issue." *CSX Transportation v. Easterwood*, 507 U.S. ___, 123 L.Ed. 387, 396 (1993). ANCSA provides in section 7(h)(1)(A) that "Except as otherwise expressly provided in this Act, Settlement Common Stock of a regional Corporation shall . . . permit the holder to receive dividends or other distributions, . . . and (iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State." 43 U.S.C. § 1606(h)(1)(A). In its finding of overly broad, de facto field preemption, the Ninth Circuit majority ignored the structure of the statute. Section 7(g)(2), the provision for elder preference stock, is the provision "otherwise expressly provided" for which section 7(h)(1)(A) calls. Careful examination of the structure of the statute results in the narrowest preemption needed. By contrast, the open-ended settlement trust provision used by Sealaska Corp. cannot be said to be the "express provision otherwise" needed to circumvent the normal state law anti-discrimination principle. The majority's holding would permit possible bizarre and extreme forms of discrimination. There is no limiting principle. *See. e.g.*, 85 F.3d at 434 (Kleinfeld, J, dissenting) (expressing doubt

that future judicial review will prevent "egregious violations of the settlement trust option" or "bizarre transfers" permitted by the majority's open-ended preemption finding).

(C) This Court should grant review to explain when preemption analysis is required.

As Judge Kleinfeld explained in his dissent, there is no basis for a preemption analysis in *Broad v. Sealaska* because there is not, and could not be any conflict between federal and state law: "The state law says that a Native corporation can do anything ANCSA permits. AS 10.06.960(f). That means there can be nothing which ANCSA permits but state law prohibits, so there can be no conflicting state law to preempt. . . . If federal law permits the particular discriminatory cash transfer through the settlement trust, state law does too, and if not, not." 85 F.3d at 432 (Kleinfeld, J. dissenting). So the majority's casual resort to a preemption analysis was not based on need or sound doctrine.

Preemption analysis should not be used where there is no conflict between state and federal law. This instant case provides an example of why the lower courts need instruction on (1) when they may resort to preemption analysis and when they may not, and (2) when they may rely upon broad statutory language (such as the statutory purpose clause) to find a preemption that is not otherwise explicitly set out in the text.

III. IMPLIED PREEMPTION ANALYSIS IS AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT

This Court has a grand tradition of granting review in cases that are of special importance to Alaska. *Alaska v. Arctic Maid*, 366 U.S. 199, 201-02, 6 L.Ed.2d 227, 81 S.Ct. 929 (1961) ("The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska."). Other cases of the genre include: *Territory of Alaska v. American Can Company*, 358 U.S. 224 (1959) (certiorari "granted in view of the fiscal importance of the question to Alaska"), and *Zobel v. Williams*, 457 U.S. 55 (1982) (striking down statewide dividend distributions that were based upon length of residency in Alaska).

The dissenting opinion recognized what havoc the majority's opinion could wreak among the Native peoples of Alaska: "Virtually any transfer of corporate assets could be provided for in a resolution which, in its preamble, said that the transfer was to 'promote the . . . welfare of its beneficiaries,' . . . [T]he majority holding implies that Congress meant to permit some bizarre transfers of Native corporation assets." 85 F.3d at 433-34. Judge Kleinfeld, himself a former U.S. District Court judge in Alaska, went on to explain how the politics of the Native community would turn the decision upon Alaska's Natives, 85 F.3d at 434, and he concluded: "I believe Congress left in place more of the state law protection generally applicable to corporate shareholders than the majority does." 85 F.3d at 435.

IV. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION WHEN THE DEFENSE OF AN IMPLIED PREEMPTION IS RAISED TO REMOVE A CASE FROM STATE COURT

This case started in an Alaska State court as a purely Alaska case. The complaint alleged Sealaska had breached its shareholder contract by paying dividends in violation of Alaska corporations statutes and in violation of the Alaska common law of corporations.

Sealaska removed the case on the reasoning that the federal statute had preempted the corporations law of Alaska. Indeed, the majority opinion found an implicit preemption of Alaska law. *Broad v. Sealaska,* 85 F.3d 422, 426 ("we find that ANCSA implicitly preempts state law").

Implicit or explicit, neither form of preemption asserted by a defendant is sufficient to support removal from a state court. *Caterpillar Tractor v. Williamson,* 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). This Court should summarily reverse (or vacate) the decision of the Court of Appeals, and remand this case for dismissal in federal court accompanied by remand to State court. Supreme Court Rule 16.1.

CONCLUSION

In the alternative, this Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court.

Respectfully submitted this 8th day of November in 1996 at Petersburg, Alaska.

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURIE ISAAC BROAD, For Himself
and all Others Who are Similarly Situated,

Plaintiffs-Appellants,

v.

SEALASKA CORPORATION;
SEALASKA ELDERS' SETTLEMENT TRUST;
PATRICK ANDERSON; CHARLES CARLSON;
JOSEPH DEMMERT, JR., et al.,

Defendants-Appellees.

Case No. 94-35310
D.C. No. CV-93-00009-HRH

OPINION

Appeal from the United States District Court for the District of Alaska

H. Russel Holland, District Judge, Presiding

Argued and Submitted August 7, 1995 – Anchorage, Alaska

Filed May 16, 1996

Before: Cynthia Holcomb Hall, Charles Wiggins and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Hall; Dissent by Judge Kleinfeld

COUNSEL

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for the defendants-appellees.

Bruce N. Edwards and Michael R. Sorenson,
Sorensen & Edwards, Seattle, Washington,
for the amicus.

OPINION by Judge Hall; DISSENT by Judge Kleinfeld

Cynthia Holcomb Hall, Circuit Judge:

Sealaska Corporation, a Native regional corporation organized under the Alaska Native Claims Settlement Act (ANCSA), established a "settlement trust" as authorized in an amendment to ANCSA. This trust, titled the Elders' Settlement Trust (EST), provides a one time $2000 payment to each Sealaska shareholder who reaches sixty-five years of age. The plaintiffs, who are shareholders of Sealaska under age sixty five, filed a class action complaint in Alaska state court claiming that creation of the settlement trust violated state corporations law and the provisions of ANCSA. Sealaska removed to federal district court and the parties stipulated to deferring the request for class certification.

The plaintiffs appeal from the district court's order granting summary judgment in favor of Sealaska on all claims. The district court had jurisdiction under 28 U.S.C.

§ 1441(a) and this Court has jurisdiction under 28 U.S.C. § 1291. We review a district court's grant of summary judgment de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). We affirm.

I

Congress enacted ANCSA, 43 U.S.C. § 1601 et seq., in 1971 "to achieve a fair and just settlement of all aboriginal land [in Alaska] . . . with maximum participation by Natives in decisions affecting their rights and property." 43 U.S.C. § 1601 note (Supp. 1995) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987). To accomplish this goal, ANCSA created regional corporations to hold and manage the Native land settlements. Congress amended ANCSA in 1987 to ensure the continuing success of the Native corporations. The amendments included a provision permitting a corporation to create a "settlement trust," a vehicle into which a corporation could transfer assets that were to be used for the health, education, and welfare of the trust beneficiaries. Assets held in these trusts enjoy protection from the corporation's creditors.

Sealaska, which is the Native Corporation for the Southeast Panhandle of Alaska, saw the settlement trust as a means to recognize the contributions of its elder shareholders and to assist them financially. The board of directors adopted a resolution to establish the EST, a trust that would be funded with corporate assets, and that would distribute $20 per share to shareholders aged sixty-five or older.

The board sent to all shareholders a proxy statement for the 1991 shareholder meeting and a description of the proposal, both of which included information about the benefits and disadvantages of the EST. The resolution received an affirmative vote from 50.7 percent of all outstanding shares, and thereby passed. The board appointed trustees and authorized the President and CEO to prepare the trust document. As of December 10, 1991, the trust has been operating according to the terms of the resolution.

In September 1992 the plaintiffs filed a class action suit in the Alaska Superior Court claiming that the cash disbursements paid out through the trust constitute a constructive dividend. They assert that this dividend is an illegal distribution because it discriminates between Sealaska shares of the same class.

Sealaska removed the case to federal court, and the parties filed cross-motions for summary judgment. In their answer to Sealaska's motion, the plaintiffs raised several additional claims. First, they argued that the proxy materials Sealaska supplied to its shareholders did not comply with applicable law because the information given was misleading and omitted material facts. Second, they argued that nonvoting shareholders should have been allowed to vote on the establishment of the EST. Finally, they claimed that the EST, under authority of federal law, takes property from the shareholders without just compensation, and thus violates their rights under the Fifth Amendment of the United States Constitution.

The district court issued several orders, which, taken together, entered judgment in favor of Sealaska and

against the plaintiffs on all claims. The plaintiffs appealed asserting an additional claim under the Due Process Clause of the Fifth Amendment. We affirm the district court's judgment on all claims, and dismiss the Due Process claim because it is not properly before us.

II

The plaintiffs' original complaint contended that the EST's disbursement of funds to elder shareholders is illegal as a discriminatory distribution under Alaska corporations law. Sealaska countered that the settlement trust provisions of ANCSA preempt state law in this respect and, therefore, the EST is a valid settlement trust authorized by ANCSA. We affirm the district court's holding that ANCSA displaces contrary state law with respect to settlement trusts, and that the EST is proper under ANCSA.

Under the Alaska Corporations Code a corporation must give equal treatment to all shares of the same class and must make its distributions without discrimination. ALASKA STAT. § 10.06.305(b). Both parties agree that the EST discriminates against shareholders who have not yet reached age sixty-five. Therefore, if the EST distributions are treated as shareholder dividends, then the payments made through the trust would violate Alaska state law and would be illegal unless authorized by ANCSA.

The district court correctly concluded that ANCSA's provisions *explicitly* preempted state law with respect to corporate resolutions that establish settlement trusts. But the relevant inquiry is not whose law governs the establishment of the trust, but instead whether a state law that

prohibits the *actions taken by the trust* is preempted by federal law. Preemption of state law regarding trust distributions is not explicitly covered by the ANCSA settlement trust provisions. Nevertheless, we find that ANCSA implicitly preempts state law in this respect.

Congress provided that conveyance of assets into settlement trusts must be carried out "in accordance with the laws of the State (*except to the extent that such laws are inconsistent with [sections 1629b and 1629e of ANCSA*])." 43 U.S.C. § 1629e(a)(1)(A) (Supp. 1995) (emphasis added). Section 1629e requires that each trust be established "to promote the health, education, and welfare of its beneficiaries and to preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1). Furthermore, it limits the use of these trusts, specifically prohibiting trusts that "discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native Corporation." 43 U.S.C. § 1629e(b)(1)(C).

According to its plain language, then, ANCSA prohibits settlement trusts that discriminate in favor of corporate insiders, but does not otherwise prohibit trusts that discriminate in favor of other groups of shareholders. This statutory section suggests that ANCSA anticipates that trusts may discriminate in favor of a particular class of shareholders. As a result, a state law that prohibits discriminatory trusts conflicts with ANCSA. When federal and state laws actually conflict, the state law is preempted. See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) ("Such a conflict arises when . . . a state law 'stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress.' ") (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)).

Additionally, the Alaska Corporations Code itself recognizes ANCSA's supremacy when conflicts arise: "a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with [the Alaska Corporations Code]." ALASKA STAT. § 10.06.960(f). Because ANCSA allows trusts that discriminate in favor of some shareholders, and the Alaska Corporations Code proscribes such actions, federal and state law conflict. In such cases, the federal law prevails. Thus, Alaska corporations law abdicates in favor of ANCSA with respect to settlement trust distributions.

Plaintiffs further contend that even if ANCSA does govern establishment of the EST, the EST is a misuse of the settlement trust option for two reasons: (1) because Congress only envisioned the trusts as land protection devices, and (2) because Congress did not intend settlement trusts to confer special benefits on subclasses of Natives. We reject both these arguments and affirm the district court's holding that the EST conforms with the provisions and purpose of ANCSA.

First, the argument that the settlement trust was intended only as a method by which corporations could shield *land* from creditors is belied by ANCSA's text and history. The EST, admittedly, does not aim specifically

to protect land.[1] But the text of ANCSA imposes no limitation on what can properly be the res of the trust. It allows Native Corporations to convey "assets (including stock or beneficial interests therein) to a Settlement Trust." 43 U.S.C. § 1629e(a)(1)(A). The permissible purposes given in the text do not relate only to interests in land: "The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1). Furthermore, ANCSA does specifically proscribe several purposes,[2] but nowhere does the text of ANCSA's settlement trust option prohibit the purposes espoused by the EST.

Second, nothing in the text of the settlement trust provisions prohibits trust distributions to less than all shareholders. In his dissent, Judge Kleinfeld argues that the EST is nothing more than an impermissible "birthday present" to elder shareholders at the expense of those not

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[1] The purpose of the EST is set forth in a document sent to shareholders entitled "A Shareholder Resolution: An Elders' Settlement Trust:"

> The purpose of the resolution is to provide a benefit to Sealaska elders in recognition of their contribution to Native culture and for the sacrifices they made to fight for and hold on to our lands. The actions of many of these people lead to the passage of the Alaska Native Claims Settlement Act (ANCSA).
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> An additional purpose is to provide health, education and welfare through a one-time cash distribution.

[2] For instance, a settlement trust may not operate as a business. 43 U.S.C. § 1629e(b)(1)(A).

yet 65 years old. Under his interpretation of the settlement trust option, *any use* of a settlement trust to benefit a subset of shareholders is improper. Such an interpretation of Section 1629e would render the settlement trust option superfluous for any purpose except as a land preservation mechanism. Alaska law and ANCSA already allow regional corporations to distribute dividends to all shareholders equally. Admittedly, the Native corporations could still use settlement trusts to preserve Native land and to protect it from creditors, while making equal distributions to all shareholders through the trust instead of through traditional corporate dividends. But nothing in ANCSA supports such a limited interpretation of the settlement trust provisions.

The legislative history of the 1987 amendments to ANCSA suggests a much more expansive purpose for settlement trusts:

> Settlement Trusts are expected to serve *two principal functions*. They are intended to be permanent, Native-oriented institutions which shall hold and manage, in perpetuity, any historic or culturally significant surface lands, sites, cemeteries, traditional use areas, or monuments, for the benefit of the beneficiary population. . . .
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> The other prime function relates to the health, education and economic welfare of its beneficiaries. . . . At the discretion of the trustees, [trust assets or income from trust assets] can be used to *provide scholarships* and other educational benefits. Assets can be used to improve health care delivery or facilities, *pay for needed health care* and otherwise be devoted to bettering the health of the beneficiary Native

> community. Finally, the Trust assets may be used to bolster the economic well-being of the beneficiaries. *Trust distributions may be used to fight poverty, provide food, shelter and clothing, and serve comparable economic welfare purposes.* Additionally, cash distributions of trust income may be made on an across-the-board basis to the beneficiary population as part of the economic welfare function.

133 Cong. Rec. H11,933 (daily ed. Dec. 21, 1987) (House Explanatory Statement), *reprinted in* 1987 U.S.C.C.A.N. 3299, 3307-08 (emphasis added). This description clearly permits across-the-board distributions to all shareholders. But it permits these distributions *in addition* to other anticipated uses of settlement trusts – such as distributions to bolster the economic well-being of individual members of the Native community through scholarships, or provisions for food, shelter, clothing, and needed health care. It is nonsensical to assume that if the shareholders vote to create a settlement trust to provide educational scholarships, that these scholarships must be distributed to every shareholder regardless of whether the shareholder is a student. Also, if a settlement trust is used to "fight poverty," or "provide food, shelter and clothing" then it seems reasonable that distributions will be made based on need, rather than on an across-the-board basis.

In promulgating the 1987 amendments, Congress noted that the corporate structure is not in every instance "well adapted to the reality of life in Native villages and to the continuation of traditional Native cultural values." 43 U.S.C. § 1601 note (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987) (Supp.

1995). Therefore, Congress intended the amendment to "enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs." *Id.* To require that settlement trust distributions be treated in every way like corporate dividends would simply reinforce the corporate structure, and limit the flexibility with which shareholders could structure their settlement.

Both the text and the legislative history support the contention that Congress intended settlement trusts as flexible instruments that would serve a number of purposes besides simply shielding Native land from creditors. Section 1629e gives a broad statement of the permissible purposes for settlement trusts, i.e., to promote the health, education, and welfare of the Native population. Nothing in this section explicitly prohibits distributions to less than all shareholders, except groups composed primarily of corporate insiders.[3] Although, as the dissent suggests, Alaska corporations law could serve to prohibit such distributions, the legislative history of the settlement trust provisions suggests that Congress intended to allow distributions to subsets of shareholders. Therefore, given the broad statement of purpose for settlement trusts, and the further elaboration of this

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[3] Furthermore, the Congressional findings that accompany the 1987 ANCSA amendments state that "by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not expressing an opinion on the manner in which such *shareholders choose to balance individual rights and communal rights.*" 43 U.S.C. § 1601 note (Supp. 1995) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987).

purpose in the legislative history, the most reasonable interpretation of Section 1629e would allow Native corporations to establish settlement trusts to benefit subclasses of shareholders.

Congress placed few limitations on the use of settlement trusts, thus enabling Native Corporations the greatest flexibility to structure their settlement to best fit the particular needs of their community. This might be construed to suggest that Native Corporations can use settlement trusts to contravene Alaska corporations law with impunity, and to thereby disadvantage many shareholders.

ANCSA does, however, limit the use of settlement trusts in several ways. It proscribes some trust activities, and defines the specific purposes for which these trusts may be created, i.e., for the health, education, and welfare of the Native community. Although this allows a wide range of applications, to simply quote this language in the preamble of a settlement trust resolution does not by itself confer validity on the proposed trust, as the dissent suggests. Judicial review of these trusts will prevent egregious violations of the settlement trust option, such as those "bizarre transfers" cited by the dissent. For example, these limits would easily preclude a trust that sought merely to discriminate against shareholders who were not members of the majority shareholders' extended family.

Furthermore, ANCSA requires majority or supermajority shareholder approval before corporations may transfer assets to these trusts. 43 U.S.C. § 1629b(d). As with any major corporate decision, shareholder approval

does not necessarily guarantee that the outcome is the most prudent course of action. But it does provide some measure of oversight. Finally, ANCSA specifies that Alaska state law governs settlement trusts in many instances, insofar as the state laws do not conflict with ANCSA. For example, Alaska trust law governs the creation and management of the trust, and Alaska corporations law defines the requirements for proxy solicitation materials, as is discussed in part III below. These limitations should provide shareholders with sufficient protection with respect to settlement trusts, while also leaving enough flexibility to meet Congress' goals.

In conclusion, the ANCSA settlement trust provisions preempt Alaska Corporations Code with respect to discriminatory settlement trusts. Sealaska's establishment of the EST conforms with the provisions and purpose of the ANCSA settlement trust option. We therefore hold that the EST is a proper use of the settlement trust provisions of ANCSA.

III

Even if Sealaska properly created the EST as authorized by ANCSA, the plaintiffs argue that shareholder approval of the EST was improper under Alaska corporations law, and that disputed issues of fact render summary judgment improper. We agree with the district court's grant of summary judgment in favor of Sealaska on this issue.

First, the plaintiffs contend that the proxy solicitation materials sent to shareholders were misleading and omitted material facts. The 1987 ANCSA amendments make

clear that proxy statements and solicitations made in the course of a Native Corporation's efforts to establish a settlement trust must comply with state law. 43 U.S.C. § 1629b (Supp. 1995). Alaska law prohibits solicitations and proxy statements that contain material misrepresentations, i.e., statements that are "false or misleading with respect to a material fact [or] omit[]a material fact necessary in order to make a statement made in the solicitation not false or misleading." 3 Alaska Admin. Code, tit. 3, § 08.315(a); see also *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976) (same); *Brown v. Ward*, 593 P.2d 247, 249-50 (Alaska 1979) (although the letter of federal proxy rules does not apply to ANCSA corporations, the spirit does).

The plaintiffs assert a variety of claims that material facts were not disclosed or were concealed in the proxy materials. For example, they claim that Sealaska omitted a material fact by expressing the cost of the EST as a lump sum of about $6 million rather than as cost per share. The district court found, however, and we agree, that the proxy solicitation materials comported with Alaska law, and that plaintiffs failed to raise genuine issues of fact as to whether they were misleading or omitted material facts. Second, plaintiffs assert that shareholder approval of the EST resolution is invalid because nonvoting shares were not allowed to vote on the proposal. ANCSA provides that shares held by non-Natives that were acquired through inheritance do not carry voting rights. 43 U.S.C. § 1606(h)(2)(C) (Supp. 1995). Then, it specifically conditions approval of a settlement trust upon majority vote of "the total voting power of the corporation," defined as "all outstanding shares of stock that *carry voting rights*." 43 U.S.C. §§ 1629b(d)(1)(A) and 1629b(e) (emphasis

added). Thus, ANCSA itself provides that nonvoting shares have no right to vote on corporate resolutions establishing settlement trusts.

The plaintiffs seek to avoid this conclusion by arguing that under state law, nonvoting shares *do* get to vote on certain fundamental corporate changes. This argument fails, however, because, as discussed previously, section 1629b expressly states that corporate resolutions to establish a settlement trust shall be governed by the provisions of ANCSA, "[n]otwithstanding any provision . . . of the laws of the State." 43 U.S.C. § 1629b(a). Thus, the nonvoting shares were properly denied the right to vote on the EST resolution. Given the foregoing, we reject plaintiffs' claim that shareholder approval of the EST resolution was invalid and affirm the district court's grant of summary judgment on this claim.

IV

The plaintiffs' final argument is that section 1629e of ANCSA is unconstitutional as applied to them for two reasons: first, allowing creation of the EST impairs the shareholders' "contract" rights under the articles of incorporation, and thus, section 1629e violates the Due Process Clause of the Fifth Amendment; second, because it authorizes Sealaska to transfer $6 million of its corporate equity to the EST, section 1629e permits a "taking" of the disadvantaged shareholders' property in violation of the Fifth Amendment.

Plaintiffs assert their due process claim for the first time on appeal. Generally, an appellate court will not hear an issue raised for the first time on appeal. *Golden*

Gate Hotel Ass'n v. San Francisco, 18 F.3d 1482, 1487 (9th Cir. 1994) (citing *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). To have been properly raised below, "the argument must be raised sufficiently for the trial court to rule on it." *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989). Because this issue was not raised below, we decline to reach the merits. As to the takings claim, we agree with the district court that, as a matter of law, the claim fails. However, we do not agree with the district court's reasoning on this issue.

The district court began its analysis "with the assumption that the use of corporate assets to create the EST amounted to a taking of the non-voting shareholders [sic] equity in the corporation for which no compensation was provided." We question the validity of this assumption. The property interest plaintiffs seek to protect is the value of their Sealaska stock.[4] But takings cases almost universally involve governmental action that affects ownership rights in *real property*, and plaintiffs cite no case authority for their claim that the Takings Clause protects their interest in Sealaska's corporate equity.

Furthermore, corporate shareholders do not directly own any part of a corporation's property or assets. They only own shares of stock, which represent a proportionate interest in the corporate equity remaining after a corporation meets all its other debts and obligations. The profits themselves belong to the corporation, and do not pass to the shareholders unless and until the board of

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[4] Plaintiffs claim that by transferring corporate assets to the EST – $6 million worth – Sealaska decreased its corporate equity, thus decreasing the value of its stock.

directors declares a dividend. Thus, the plaintiff shareholders have no proprietary interest that could have been "taken."

Nevertheless, even if we accept the premise that plaintiffs' interest in Sealaska's corporate equity may be the subject of a takings claim, the claim still fails for lack of sufficient government action. Takings jurisprudence encompasses two lines of authority: physical occupation cases, and regulatory takings cases. *Compare Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that New York law *requiring* landlords to allow cable television companies to install cables in their buildings constituted a physical intrusion sufficient to be a taking) *with Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2895 (1992) (indicating that when a government land use regulation forces the owner of real property "to sacrifice all economically beneficial uses [of his property,] he has suffered a taking"). Plaintiffs allege no physical invasion of property, so their claim must fall into the regulatory taking category.

Regulatory takings generally require some government regulation or other government action that compels the owner to sacrifice all economically viable use of his or her property. *E.g., Lucas*, 112 S. Ct. 2886 (the state's coastal preservation statute prevented the landowner from building any structure on his property). In this case, Sealaska was not in any way compelled by the federal government to create the EST. The settlement trust option is just that – an option. That Sealaska's action was authorized by federal law does not transmute it into government action sufficient for the Fifth Amendment. Without governmental encouragement or coercion, actions taken

by private corporations pursuant to federal law do not transmute into government action under the Fifth Amendment. *See, e.g., Fidelity Financial Corp. v. Federal Home Loan Bank*, 792 F.2d 1432, 1435 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) (finding no government action in a bank's loan decision even though the bank was created by a federal agency to accomplish federal objectives, was subject to extensive federal regulation, and some of the bank's directors and managers were appointed by a federal bank board). *But see Ginn v. Mathews*, 533 F.2d 477, 480 (9th Cir. 1976) (finding governmental action in an employment decision made by the Economic Opportunity Council of San Francisco, but emphasizing that the Council was operating with almost exclusively federal funds); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding government action largely on the basis that the defendant, a private lessee, received significant financial support from the parking authority). Even in cases in which the court found government action, it often reiterated the general principle that "[w]here the action taken is entirely by a private corporation with no overriding or pervasive [government] involvement, the provisions of the First, Fifth, and Fourteenth Amendments impose no limitations upon that action." *Ginn*, 553 F.2d at 479.

In this case, Sealaska is a private corporation that established the EST using private funds. The operation of the trust is not subject to governmental oversight. Furthermore, Sealaska was neither encouraged nor coerced into creating the EST by the federal government. It merely exercised its option under ANCSA to transfer its assets to a settlement trust. We therefore affirm the grant

of summary judgment in favor of Sealaska on the plaintiffs' takings claim.[5]

V

Through instruments like the settlement trust, Congress sought to expand the ability of Native Corporation shareholders to "structure the further implementation of the settlement in light of their particular circumstances and needs." 43 U.S.C. § 1601 note (Supp. 1995) (Congressional Findings and Declaration of Policy for ANCSA Amendments of 1987). Sealaska did just that, establishing its Elders' Settlement Trust to address concerns related to the welfare of its elder shareholders. We conclude that Sealaska's Elders' Settlement Trust is a legitimate use of the settlement trust option as authorized by ANCSA, and that such use comports with the plain language and the purpose of the ANCSA amendments. The district court's order granting summary judgment in favor of Sealaska on all claims is AFFIRMED.

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[5] The district court ultimately concluded that the takings claim failed because the distribution of funds to elder shareholders was for a private use, and not a public use within the purview of the Fifth Amendment. The district court failed to see that takings for a private use, as opposed to a public use, are presumptively unconstitutional. *See, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) ("[T]he Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a public purpose, even though compensation be paid.' ") (quoting *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937)). Therefore, the district court erred when it held that because this alleged taking was for a *private use* it did not violate the plaintiffs' Fifth Amendment rights.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Sealaska, organized as a business corporation, decided to give each shareholder a $2,000 birthday present at age 65. That discriminates by age, because at the time of the decision, not all the shareholders were 65. Several directors would immediately or soon receive this substantial gift. Many shareholders would not receive the gift for decades. The present value of the gift, assuming a 5% interest rate, is $2,000 to a 65 year old director, $284 to a 25 year old shareholder.

This discriminatory cash gift to shareholders, as the majority acknowledges, would violate Alaska corporation law, if federal law does not provide otherwise. Under the Alaska Corporations Code, all Alaska corporations must treat all shares in the same class equally with respect to dividends and other rights. ALASKA STAT. §§ 10.06.542, 10.06.305(b).

The preemption analysis used in the majority opinion is mistaken, because any preemption is illusory. There cannot be federal preemption of state law in this case, because there cannot be any conflict between the two laws. The state law says that a native corporation can do anything ANCSA permits. ALASKA STAT. § 10.06.960(f). That means there can be nothing which ANCSA permits but state law prohibits, so there can be no conflicting state law to preempt. ANCSA says that a conveyance to a settlement trust should be in accord with Alaska law except to the extent that state law is inconsistent with ANCSA. 43 U.S.C. § 1629e(a)(1)(A). That means that there can be no preemption of the field. If federal law permits

the particular discriminatory cash transfer through the settlement trust, state law does too, and if not, not.

The majority opinion says that "[a]ccording to its plain language, then, ANCSA prohibits settlement trusts that discriminate in favor of corporate insiders, but does not prohibit trusts that discriminate in favor of other groups of shareholders." Maj. op. at 5872, at 426. The "plain language" consists only of the prohibition. The non-prohibition described in that sentence is an inference from silence, not an expression by Congress in plain language. The provision which provides the basis for the majority's conclusion states only what is prohibited, not what is permitted:

> The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives. A Settlement Trust *shall not* –
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> (A) operate as a business;
>
> (B) alienate land or any interest in land received from the settlor Native Corporation (except if the recipient of the land is the settlor corporation); or
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> (C) discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native Corporation.
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> An alienation of land or an interest in land in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

43 U.S.C. § 1629e(b)(1) (emphasis added). The majority reasons that because the statute prohibits trusts that discriminate in favor of employees, officers, and directors,

"but does not otherwise prohibit trusts that discriminate in favor of other groups of shareholders[,] [t]his statutory section suggests that ANCSA anticipates that trusts may discriminate in favor of a particular class of shareholders." Maj. op. at 5872, at 426.

This method of reasoning, inferring from the explicit prohibition of one form of discrimination the implicit authorization of all other forms, is a traditional application of the maxim, *expressio unius est exclusio alterius*. Quoting the maxim is less fashionable than it used to be before Karl Llewellyn's famous attack. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 401-406 (1950), *as reproduced in*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS, App. C, 521-35 (1960). But the logic of the maxim, that listing several specific things implies an intention to exclude others, is the only way to get from a statutory prohibition of some conduct to implied permission for other conduct. This is how the majority gets from the "shall not" in the statute to the majority's statement that "ANCSA anticipates that trusts may discriminate in favor of a particular class of shareholders."

The *expressio unius* analysis is often correct, but not always. It does not make sense here. Anytime a statute contains a list, the question arises whether the list exhausts all the things the legislature intended to permit or prohibit. The inference that a list excludes things not on the list does not relieve us of our duty to make sense of the statute:

> Most strongly put, the *expressio unius*, or *inclusio unius* principle is that '[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.' *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270, 20 L.Ed 570 (1871). This is a rule of interpretation, not a rule of law. The maxim is 'a product of logic and common sense,' properly applied only when it makes sense as a matter of legislative purpose. *Alcaraz v. Block*, 746 F.2d 593, 607-08 (9th Cir. 1984). Like the principle of construing a modifying clause to modify only the closer antecedent, the *expressio unius* principle describes what we usually mean by a particular manner of expression, but does not prescribe how we must interpret a phrase once written. Understood as a descriptive generalization about language rather than a prescriptive rule of construction, the maxim usefully describes a common syntactical implication. 'My children are Jonathan, Rebecca and Seth' means 'none of my children are Samuel.' Sometimes there is no negative pregnant: 'get milk, bread, peanut butter and eggs at the grocery' probably does not mean 'do not get ice cream.'

Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1312-13 (9th Cir. 1992).

It does not make sense to suppose that Congress meant, by the list in § 1629e(b)(1), to permit any kind of discrimination, except "discrimination in favor of . . . employees, officers or directors." Consider, by analogy, that Congress in the Americans With Disabilities Act said "[n]o covered entity shall discriminate against a qualified individual with a disability." 42 U.S.C. § 12112.

The ADA does not by that prohibition imply that discrimination by reason of age, sex, and race are permissible. The provision prohibits one kind of discrimination, and leaves it to other federal and state laws to prohibit others. That is the sensible way to read the prohibition in the statute before us.

This makes sense as a Congressional purpose. Congress might have felt that there were special risks to Native corporations that they would be taken advantage of by employees, officers and directors through the Settlement Trust mechanism, unique to Native Corporations, so more protection of shareholders from this device was needed than for ordinary business corporations, but felt that for other risks, state law protections were adequate. One of the virtues of the Alaska Native Claims Settlement Act was the creation of a large number of Alaska Native leaders experienced in business as well as politics, and employment opportunities in towns and villages where there had previously been little work for money wages. But this virtue could become a vice if the corporations were operated for the benefit of their employees, who might not be natives or shareholders, instead of for all the Natives who owned stock and would inherit stock.

Virtually any transfer of corporate assets could be provided for in a resolution which, in its preamble, said that the transfer was to "promote the . . . welfare of its beneficiaries," and, so long as the recipients were Alaska Natives, to "preserve the heritage and culture of Natives." Unless someone thinks of a distinction in some future case, the majority holding implies that Congress meant to permit some bizarre transfers of Native corporation assets. For example, a Native corporation might

decide that a particular candidate for office was likely to promote the health, education, and welfare of Alaska Natives better than competing candidates, and that Native culture would best be preserved by using a trust to pay $2,000 to each Native who signed an affidavit that he or she had voted for the named candidate. Quite a few Alaska native villages have fewer than 100 people, and many have under 300. *See* THE ALASKA ALMANAC: FACTS ABOUT ALASKA, 17TH EDITION, 130-31, 147-53 (Carolyn Smith ed.) (1993). Village Corporations may create settlement trusts under ANCSA. 43 U.S.C. §§ 1602 (defines "Native Corporation" to include "Village Corporation") and § 1629e (permits any Native Corporation to create a settlement trust). Under the majority construction of the statute, a village corporation, a majority of whose shareholders were linked by blood or property to a large extended family, might decide that Native culture was best preserved by funneling the assets through a settlement trust out to their family and not the other families in the village.

The majority says that "[j]udicial review of these trusts will prevent egregious violations of the settlement trust option, such as [these] 'bizarre transfers.' " But it does not say how. The majority opinion establishes that the federal law preempts state law, and "does not otherwise prohibit trusts that discriminate in favor of other groups of shareholders," and "trusts may discriminate in favor of a particular class of shareholders." Maj. op. at 5872, at 426. I hope that subsequent panels distinguish the case at bar if "bizarre transfers" through settlement trusts are made, but I do not see a basis, in the majority's *ratio decidendi*, for making a distinction.

In any corporation, Native or not, people with more power than others may try to translate their power into money. It is unlikely that Congress meant to deprive Native corporation shareholders of all the protections state corporation law generally gives to shareholders against discriminatory distributions of corporate assets. Yet the hypothetical forms of discrimination described above would not be "in favor of a group of individuals composed only or principally of employees, officers, or directors," so under the majority holding, any state law prohibiting such discrimination would be preempted. None of this seems likely to have been the intent of Congress, because it does not make any practical sense.

If we are to apply the *expressio unius* principle to anything, it should be to the statutory provision speaking directly to how to enhance benefits to elders. There is a special provision for issuance of up to 100 additional shares of regional corporation stock to natives who have attained the age of 65:

> A Regional Corporation may amend its articles of incorporation to authorize the issuance of additional shares of Settlement Common Stock to –
>
> . . . .
>
> (III) Natives who have attained the age of 65, for no consideration or for such consideration and upon such terms and conditions as may be specified in such amendment or in a resolution approved by the board of directors pursuant to authority expressly vested in the board by the amendment. The amendment to the articles of incorporation may specify which

> class of Settlement Common Stock shall be issued to the various groups of Natives.

43 U.S.C. § 1606(g)(1)(B)(i).

The *expressio unius* inference, as applied to this section, implies that Congress intended that discrimination in favor of elders would take place only through regional corporations, not village corporations, and exclusively through amendments to the articles of incorporation issuing more stock to elders (which may, in turn, yield more dividends). See 43 U.S.C. § 1606(g)(1)(B)(iv) (common stock issued to elders as the result of a special amendments shall not have rights to certain distributions unless a majority of shareholders specially grant such rights). Accordingly, we could assume that Congress intended to leave in place state prohibitions against other forms of discrimination in favor of elders.

One use of settlement trusts is to preserve native corporation assets from creditors, *see* 43 U.S.C. § 1629e(c)(5), and from the consequences of accidental corporate dissolution. The statute states the purpose of settlement trusts, "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." 43 U.S.C. § 1629e(b)(1). Most corporations cannot operate for such purposes, so excluding discriminatory dividends from the purposes does not strip the statute of practical effect. We need not decide whether the statements in the legislative history, such as that settlement trusts can be used to award scholarships to individuals, are correct. Perhaps such scholarship programs are permissible, so long as the criteria for the scholarship awards are nondiscriminatory. Or perhaps

this snippet of legislative history was a consolation prize to someone who did not get what he or she wanted in the statute. We should not assume the answer to one difficult question not before us in order to resolve another.

The majority relies too heavily, in my view, on the "House Explanatory Statement." Maj. op. at 5874, at 428. We should construe the statute, not the legislative history. See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987). Reliance on legislative history is often the "equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J. concurring). The majority infers from the statement in the House Explanatory Statement that if scholarships are permissible, then so are birthday presents. A stronger inference would be that if "distributions of trust income may be made on an across-the board basis," House Explanatory Statement, 133 CONG. REC. H11,933, (daily ed. Dec. 21, 1987), *reprinted in*, 1987 U.S.C.C.A.N. 3299, 3308, then they cannot be made on a discriminatory basis.

In sum, the statute says some types of discrimination are prohibited, and also says that Native corporations can provide for issuance of additional shares of stock to elders. The majority reads a negative pregnant into the discrimination section but not the elders section. I do not see why the first inference is any stronger than the second, and see good reason for the contrary view. The majority infers from the statement about scholarships in the legislative history that discriminatory distributions

are permitted, but draws no inference that they are prohibited from the "across-the-board" language about distributions in the same paragraph. We must necessarily exercise judgment on difficult questions to decide the extent to which the statute exposes Native shareholders to discriminatory distributions of corporate assets. I believe Congress left in place more of the state law protection generally applicable to corporate shareholders than the majority does.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAURIE ISAAC BROAD, et al., For Themselves and All Others Who Are Similarly Situated *Plaintiffs-Appellants* vs. SEALASKA CORPORATION, SEALASKA ELDERS' SETTLEMENT TRUST, et al., *Defendants-Appellees*	Docket No. 94-35310 **ORDER** FILED Jul 11, 1996

Before: HALL, WIGGINS and KLEINFELD, Circuit Judges.

Judges Hall and Wiggins have voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kleinfeld would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LAURIE ISAAC BROAD, et al., Plaintiffs, vs. SEALASKA CORPORATION, et al., Defendants	No. J93-0009-CV (HRH) ORDER (Motion for Summary Judgment)

The issue before the court is whether Sealaska Corporation (hereinafter "Sealaska"), a Native regional corporation established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-28 (hereinafter "ANCSA"), can give its shareholders who are age 65 years or older a $20 per share benefit through an Elders' Settlement Trust. The suit is a direct action brought by shareholders of Sealaska against the corporation, the corporation's directors, and others, charging that the distribution scheme unfairly discriminates against shareholders who are not old enough to qualify for the $20 per share benefit. The disadvantaged shareholders have moved for partial summary judgment[1] against the corporation to establish the corporation's liability for failing to include the shareholders in the Elders' Settlement Trust.[2] The motion is opposed by Sealaska. Sealaska also

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[1] Clerk's Docket No. 14.

[2] The disadvantaged shareholders have also moved this court for an order striking the defendants' fourth affirmative

asserts its own motion for summary judgment[3] asking this court to find the Elders' Settlement Trust lawful. That motion is opposed by the plaintiff shareholders. The court has heard oral argument.

Sealaska is the Native regional corporation for Southeast Alaska. Its shareholders are predominantly Alaska Natives of Tlingitt, Haida, and Tsimpsian descent. Elders of these cultures occupy a special position of honor and respect. In keeping with this tradition and to provide special recognition to elders for their contributions to the development and passing of ANCSA, Sealaska announced in June, 1991, that it would be seeking shareholder approval of a method to benefit the corporation's elder shareholders. *See* Plaintiffs' Exhibits for Class Certification and Summary Judgment, Clerk's Docket No. 16, Exhibit 11, at 2 (stating, among other things, that the amendments to ANCSA provided at least four ways to transfer benefits to elder shareholders).[4]

The Board of Directors of Sealaska approved a resolution to establish an Elders' Settlement Trust. That resolution was put to a shareholder vote at the November 2,

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defense. Clerk's Docket No. 25. The court's resolution of the parties' cross-motions for summary judgment renders a decision on that motion unnecessary. The plaintiffs' motion to strike is denied as moot.

[3] Clerk's Docket No. 26.

[4] In November, 1990, Sealaska announced that it intended to provide the corporation's elders with a one-time payment of $2,000 per one hundred shares to be paid in December, 1990. Id., Exhibit 6, at 2. That payment plan was repealed by the corporation when its legal counsel concluded that such a plan needed shareholder approval. Id., Exhibit 9, at 3; Exhibit 10, at 3.

1991, shareholder meeting. *See id.*, Exhibit 14 at 8 (Notice of Annual Meeting and Proxy Statement). A proxy statement describing the resolution was mailed to all shareholders prior to the vote. *See id.*, Exhibit 14.

The resolution upon which the shareholders were to vote stated:

> Shall Sealaska Corporation establish an Elders' Settlement Trust as authorized in the Alaska Native Claims Settlement Act '1991 Amendments' to provide Elders (who are a defined class of shareholders aged 65 and over) with a one-time financial benefit of $20 per share of Settlement Common Stock owned by a shareholder as of November 2, 1991, and other benefits, or who are shareholders on November 2, 1991 and become aged 65 at any time during the life of the trust?

Id., Exhibit 14, at 8. The stated purpose of the Elders' Settlement Trust resolution in the proxy materials was:

> [T]o provide a benefit to Sealaska elders in recognition of their contributions to Native culture and tradition and the work that many of them did on the development and passage of the Alaska Native Claims Settlement Act. The benefit is intended to help provide for some of the special needs that our elders have related to health care and general welfare.

Id., Exhibit 14, at 8-9. The trust was to be funded by Sealaska's corporate assets with an initial transfer of approximately $6 million. *Id.*, Exhibit 14, at 13.

The proxy materials described the advantages and disadvantages of the Elders' Settlement Trust. *See id.*,

Exhibit 14, at 13-14. Among the advantages set forth were an immediate financial benefit to elder shareholders, the trust assets were protected from bankruptcy and creditor claims, and negligible tax consequences. *See id.*, Exhibit 14, at 13-14. The disadvantages listed were that the trust would be funded by corporate assets which belong to all shareholders, and that the trust was not immune from inflation. *See id.*, Exhibit 14, at 14. Additional limitations noted were that the trust benefit could not be willed or transferred and each shareholder's payment from the trust would be based on his or her stock ownership as of the date of the election. *See id.*, Exhibit 14, at 9.

In order to be adopted, ANCSA required that the Elders' Settlement Trust resolution receive an affirmative vote from a majority of the total voting shares of the corporation. *See* 43 U.S.C. § 1629b(d) (establishing the voting standards for settlement trusts), on the record date for the 1991 annual meeting, Sealaska had 1,546,198 outstanding voting shares. Affidavit of Leroy Funk, Clerk's Doc. No. 28. The trust resolution received 784,107 votes or 50.7 percent of all outstanding voting shares.

A. Summary Judgment Standard

A court will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Procedure. In other words, a motion for summary judgment asks the court to perform the threshold inquiry of whether there are "any genuine factual

issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). If genuine factual issues are found, summary judgment is denied. If, however, the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 250 (citations omitted).

B. Validity of the Elders' Settlement Trust

Both parties agree that the Elders' Settlement Trust discriminates under Alaska corporations law against shareholders who have as yet not reached the age of 65 years. The trust will be valid only if its creation is a legitimate use of the settlement trust option, 43 U.S.C. § 1629e, created under the 1987 ANCSA amendments and if federal law preempts Alaska corporations law in this area.

The first issue is whether the Elders' Settlement Trust created by Sealaska to exclusively benefit its elder shareholders through a $20 per share one-time distribution is a valid use of the settlement trust option under the 1987 ANCSA amendments. Plaintiffs concede that the 1987 amendments provided a method to benefit elder shareholders. They contend, however, that the exclusive method was the issuance of additional shares of elders' preference stock through the amendment of the articles of incorporation as permitted by 43 U.S.C. § 1606(g). Plaintiffs assert that the use of a settlement trust was an inappropriate vehicle to benefit elders, because the purpose of the settlement trust option was to place Native cemetery, cultural, and historic sites beyond the reach of

corporate creditors and to provide assets to maintain those sites.

1. The 1987 Amendments

In 1987, Congress amended ANCSA to ensure the continued success of the Native settlement and to guarantee Natives continued participation in decisions affecting their rights and property.[5] Included among the provisions

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[5] The congressional findings and declaration of policy for the ANCSA amendments of 1987 are set out below:

> The Congress finds and declares that –
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> (1) the . . . [ANCSA] was enacted in 1971 to achieve a fair and just settlement of all aboriginal land and hunting and fishing claims by Natives and Native groups of Alaska with maximum participation by Natives in decisions affecting their rights and property;
>
> (2) the settlement enabled Natives to participate in the subsequent expansion of Alaska's economy, encouraged efforts to address serious health and welfare problems in Native villages, and sparked a resurgence of interest in the cultural heritage of the Native peoples of Alaska;
>
> (3) despite these achievements and Congress's desire that the settlement be accomplished rapidly without litigation and in conformity with the real economic and social needs of Natives, the complexity of the land conveyance process and frequent and costly litigation have delayed implementation of the settlement and diminished its value;
>
> (4) Natives have differing opinions as to whether the Native Corporation, as originally structured by the. . . . . [ANCSA], is well adapted to

added to ANCSA, Congress provided that "[a] Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extent that such laws are inconsistent with this section and section 1629b of this title)". 43 U.S.C. § 1629e(a)(1)(A); *see id.* § 1629b (detailing specific procedures for creation of settlement trusts by a Native regional corporation). The purpose of the settlement trust option as described in the Act was "to promote the health, education, and welfare of its

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the reality of life in Native villages and to the continuation of traditional Native cultural values;

(5) to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property, the . . . [ANCSA], must be amended to enable the shareholders of each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs;

(6) among other things, the shareholders of each Native Corporation must be permitted to decide –

(A) when restrictions on alienation of stock issued as part of the settlement should be terminated, and

(B) whether Natives born after December 18, 1971, should participate in the settlement;

(7) by granting the shareholders of each Native Corporation options to structure the further implementation of the settlement, Congress is not expressing an opinion on the manner in which such shareholders choose to balance individual rights and communal rights. . . .

Act of February 3, 1988, Pub. L. 100-241 § 2, 101 Stat. 1788.

beneficiaries and preserve the heritage and culture of Natives". *Id.* § 1629e (b) (1). A settlement trust could not operate as a business, alienate Native land or an interest in Native land, or "discriminate in favor of a group of individuals composed only or principally of employees, officers, or directors of the settlor Native corporation". *Id.*

The Elders' Settlement Trust comports with the plain meaning of the 1987 ANCSA amendments. The purpose of the Elders' Settlement Trust was to provide for the special health and welfare needs of Sealaska's shareholders over the age of 65 years and to afford a gesture of honor and respect to these shareholders in keeping with Native culture. These purposes conform fully with the limitations of the settlement trust option of ANCSA as described by section 1629e(b)(1).[6]

The Plaintiffs claim that the exclusive method of benefiting elder shareholders was through the issuance of additional shares of elders' preference stock under section 1606(g). The plaintiffs do not, however, direct the court's attention to statutory language evincing congressional intent to limit the methods available to a Native corporation to benefit its elder shareholders. The court concludes that no such limitation was intended. To the

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[6] Although the court finds the statutory language unambiguous and thus finds it unnecessary to look to the legislative history of the 1987 ANCSA amendments, *see In re Kelly*, 841 F.2d 908, 912 (9th Cir. 1988), the legislative history supports the view that Congress contemplated that the settlement trust assets could be used "to bolster the economic well-being of the beneficiaries". *House Explanatory Statement*, 133 CONG. REC. H.11933 (Dec. 21, 1987), *reprinted* in 1987 U.S.C.C.A.N. 3299, 3307-08.

contrary, the statutory language authorizing the issuance of additional shares of stock to elders manifests the freedom Congress sought to provide regional corporations' attempts to benefit their shareholders. *See id.* § 1606(g). Section 1606(g) permits the corporation to issue additional shares of stock to Natives who have obtained the age of 65. Such stock may be either Settlement Common Stock issued pursuant to 1606(g)(1)(B)(i)(III) or other forms of stock issued pursuant to 1606(g)(2)(A). Settlement Common Stock carries with it the right to vote, the right to receive dividends, and all other rights of a shareholder in an Alaskan corporation. *See id.* § 1606(h)(1)(A). In addition to Settlement Common Stock, other more specialized forms of common or preferred stock may be issued by a regional corporation to its elder shareholders with such relative dividend, voting, liquidation, and other rights as the approving shareholders shall authorize. *See id.* § 1606(g)(2)(B).[7] A purpose of the 1987 ANCSA amendments was "to enable the shareholders of

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[7] It is not surprising that 1987 ANCSA amendments regarding the issuance of additional shares requires amendment of the articles of incorporation since, as a general rule, the number of shares a corporation is authorized to issue must be set forth in the articles of incorporation. *See* AS 10.06.208(5)-(6); REVISED MODEL BUSINESS CORPORATION ACT § 2.02 (a) (2). In the case of benefiting elders, the 1987 ANCSA amendments require a similar affirmative vote of the shareholders whether the benefit is through the issuance of additional shares of stock or via a settlement trust. *See* 43 U.S.C. § 1629b(d)(1) (stating that the affirmative vote of the shareholders of a Native Corporation required to authorize additional shares or create a settlement trust is a majority of the total voting power of the corporation unless the corporation establishes a level greater than a majority through the amendment of its articles of incorporation).

each Native Corporation to structure the further implementation of the settlement in light of their particular circumstances and needs". Act of February 3, 1988, Pub. L. 100-241, § 2, 101 Stat. 1788. The use of a settlement trust instead of additional stock to benefit elders conforms with the plain meaning and purpose of the 1987 ANCSA amendments.

2. Federal Preemption

Alaska law prohibits discriminatory treatment among a class of shareholders. AS 10.06.305(b). Therefore, the Elders' Settlement Trust, which provides a distribution of benefits to discrete members of a class of shareholders at the exclusion of the remainder of the class, will be valid only if federal law preempts Alaska law with regard to this distribution. Under the Supremacy Clause, U.S. Const., art. VI, cl. 2, state laws that interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, are invalid. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2481 (1991). Congressional intent to preempt state authority may be found in the following ways. First, Congress may express its intent to supplant state authority in a particular field in the terms of the statute. *Id.* at 2481. Absent express language, Congress' intent to preempt state law may be implied:

> [I]f a scheme of federal regulation is so "pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same

> subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude state authority.

Id. at 2481-82 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

With respect to the Settlement Trust arrangement the statutory language of the 1987 ANCSA amendments establishes that Congress expressly intended to preempt Alaska law with regard to equivalent treatment of a class of shareholders of a Native regional corporation. In setting out the procedures for considering amendments and resolutions authorized by the 1987 ANCSA amendments, Congress has provided that:

> (a) Coverage
>
> Notwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation or of the laws of the State, except those related to proxy statements and solicitations that are not inconsistent with this section –
>
> . . . .
>
> (3) a resolution to establish a Settlement Trust; or
>
> . . . .
>
> shall be considered in accordance with the provisions of this section.

43 U.S.C. § 1629b(a). Congress could not have been more explicit in providing that resolutions for the establishment of settlement trusts are to be governed by federal law, not the laws of the State of Alaska. If that were not enough, Congress underscored its intent by making

express provision that certain aspects of the process (proxy statements and solicitations) would be governed by State law to the extent that the same were not inconsistent with § 1629b(a). AS 10.06.305(b) is preempted for purposes of the settlement trust distribution which the Sealaska shareholders approved.

Congressional intent to preempt Alaska law is equally evident in the goals sought to be obtained by the creation of a settlement trust option for regional corporations. The purpose of the settlement trust option is to permit Native corporations to promote the health education, and welfare of trust beneficiaries. *See* 43 U.S.C. § 1629e(b)(1). Alaska's requirement that all shareholders be treated equally would thwart that purpose because it would hinder any settlement trust that sought to benefit discrete members of a class of shareholders. To effectuate the purposes envisioned by the settlement trust option, Congress intended to supplant contrary Alaska law.[8]

A settlement trust may provide for dissimilar treatment of different members of a class of shareholders so long as it is formed to promote the health, education, and welfare of the trust beneficiaries. The Elders' Settlement Trust seeks to benefit Sealaska shareholders 65 years of age and older in recognition of their special health and

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[8] Additional support for preemption of Alaska law in this instance can be found in the state statutes. The Alaska legislature has expressly conceded that regional corporations are governed by ANCSA to the extent ANCSA is inconsistent with the Alaska Corporations Code. See AS 10.06.960(f). Alaska law requiring equal treatment of members of a class of shareholders is inconsistent with the purposes of the settlement trust option.

welfare needs and as a gesture of honor and respect. The Elders' Settlement Trust is a legitimate use of the settlement trust option and the trust could be used to benefit discrete members of a class of shareholders of Sealaska despite state law requiring a class be treated similarly.

C. Disclosures to Shareholders Regarding Trust

The next issue is whether Sealaska's disclosures to its shareholders in soliciting proxies to vote on the adoption of the Elders' Settlement Trust meet the applicable legal requirements. The 1987 ANCSA amendments provide the basic procedure for a Native Corporation to consider a resolution establishing a settlement trust. *See* 43 U.S.C. § 1629b. These procedures are to be considered, "[n]otwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation or of the laws of the State, except those related to proxy statements and solicitations that are not inconsistent with this section. . . . "*Id.* § 1629b(a)[9] For a resolution to create a settlement trust approved by the board of directors of a Native Corporation, section 1629b requires that written notice setting forth the resolution be given to the shareholders not less than 50 days nor more than 60 days prior to a shareholder meeting. *Id.* § 1629b(b)(2)(A). The corporation is further permitted to "communicate with its shareholders at any time and in any manner authorized by the laws of the State". *Id.*

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[9] ANCSA expressly exempts Native corporations from the federal securities laws that govern proxy solicitations. 43 U.S.C. § 1625.

Alaska law governing the content of proxy solicitations prohibits management from making misleading statements or omitting a material fact necessary in order to make the statements made not misleading. AS 45.55.160; *see Alaska Admin. Code* tit. 3, § 08.315 (prohibiting false or misleading proxy solicitations to shareholders of corporations organized pursuant to ANCSA). A misrepresentation is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. *Alaska Admin. Code* tit. 3, § 08.315

The parties do not dispute that the creation of the Elders' Settlement Trust complied with – the procedures prescribed by the 1987 amendments: resolution of the Board of Directors and written notice to the shareholders. The plaintiffs assert that Sealaska's proxy disclosures regarding the Elders' Settlement Trust, however, were incomplete, inaccurate, and misleading. Specifically, Sealaska failed to disclose: (1) that numerous shareholders opposed the trust; (2) that creation of the trust without amendment of the articles of incorporation is contrary to law; (3) that the purpose of the settlement trust option was protection of land; (4) that a high percentage of shareholders would be excluded from the trust; (5) that new shareholders who acquire their shares after November 2, 1991, are not eligible for the Elders' Settlement Trust; (6) that heirs of shareholders who died under the age of 65 years were not eligible for trust benefits; (7) that a distribution required amendment of the articles of incorporation; and (8) that the majority of the directors were eligible for the trust or would be eligible within five years.

The September 3, 1991, proxy statement provided shareholders of Sealaska with a description of the settlement trust option set forth by Congress and a detailed description of how that option could be used to benefit shareholders of Sealaska who reach the age of 65 years. *See* Plaintiffs' Exhibits for Class Certification, Clerk's Docket No. 14. In addition to the advantages available through the creation of an Elders' Settlement Trust, the proxy statement disclosed the limitations associated with the trust. In particular, the September 3, 1991, statement specifically disclosed the limitations raised by the plaintiffs. The statement revealed that eligibility to receive the trust benefit would be limited to those shareholders over the age of 65 years. *Id.*, Exhibit 14, at 9. The proxy statement also explained the eligibility requirements; that eligibility for an amount of any trust benefit was determined by a shareholder's ownership of Sealaska shares as of November 2, 1991. *Id.* New shareholders who acquire their shares after November 2, 1991, would not be eligible for a trust benefit. Finally the statement further explained that the trust benefit could not be willed or transferred. *Id.* Thus heirs of shareholders who died under the age of 65 years were not eligible for trust benefits.

In addition to the limitations described, the proxy statement also outlined the specific disadvantages of the Elders' Settlement Trust; that the trust would cost approximately $6 million of corporate resources to fund and that the financial benefit of the trust was not inflation proof. *Id.*, Exhibit 14, at 13-14. The plaintiffs have not directed the court's attention to, nor does the court find anything misleading about the presentation put forth in

the proxy statement. Instead, the court believes the corporation furnished an accurate depiction of the Elders' Settlement Trust and its effect on Sealaska and Sealaska's shareholders.

Plaintiffs have contended that it should have been disclosed to the shareholders that the creation of the settlement trust without an amendment of the articles of incorporation was contrary to law, that the purpose of the settlement trust option was to protect land and that a distribution required amendments to the articles of incorporation. The first and third of these contentions overlap and assert propositions which are just plain wrong. As discussed above, § 1629b(a) expressly preempts state law and as regards settlement trusts provides that they may be created and implemented "[n]otwithstanding any provision of the articles of incorporation and bylaws of a Native Corporation". The contention that the purpose of the settlement trust was to protect land is also wrong as discussed above. Section 1629(e) makes express provision for the conveyance of corporate assets to a settlement trust stating:

> A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust. . . .

43 U.S.C. § 1629e(a)(1)(A). Plainly Congress intended that any corporate assets, even stock, might be placed in a settlement trust. Accordingly there was no basis for Sealaska to have made the disclosure for which the plaintiffs argue.

Following the proxy statement, Sealaska shareholders received a pamphlet providing more information

about the Elders' Settlement Trust. *Id.*, Exhibit 16. The pamphlet again discussed the trust's purpose, its positive and negative aspects, as well as the results of a shareholder survey on the topic of giving a special benefit to elder shareholders. *See id.* In addition to the pamphlet, the Sealaska shareholders received a number of other announcements about the Elders' Settlement Trust, each stating that the board of directors of Sealaska favored the formation of the trust and recommending the shareholders vote in November, 1991.[10] The court concludes that these materials did not contain any misleading statements or representations.

Plaintiffs claim that statements by Sealaska that there was substantial shareholder support for the Elders' Settlement Trust was misleading because a 1982 shareholder survey showed that only 10% of the shareholders favored providing a benefit to elders. *See id.*, Exhibit 1, at 15, ¶ 7b. The plaintiffs' evidence does not have any tendency to show that the 1991 Sealaska proxy materials were misleading because the evidence does not indicate whether the shareholders supported or opposed a benefit

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[10] *See id.*, Exhibit 11 (copy of *Sealaska Shareholder*, June, 1991, magazine with advertisement describing shareholder support for benefiting elders); Exhibit 17 (October 3, 1991, letter from Marlene Johnson, Chairman of the Board of Sealaska, stating that the board of directors favored creation of the trust and suggesting shareholders cast vote); Exhibit 18 (copy of October 31, 1991, Elders' Settlement Trust bulletin stating that the board of directors favored trust and suggesting shareholders cast a vote for the trust) Exhibit 19 (copy of *Sealaska Shareholder*, Oct.-Nov., 1991, magazine stating that the board of directors favored the trust and recommending shareholders cast a vote for the trust).

to elders, but instead merely shows that, in relation to numerous other activities that Sealaska could engage in, benefiting elders received the support of 10% of the shareholders. *See id.*

Plaintiffs assert that Sealaska failed to disclose that the majority of directors that approved the trust were 65 years old or would reach 65 years within the next five years. The plaintiffs, however, offer no evidence to support this assertion. Furthermore, Sealaska counters that only five of the 16 directors were either 65 years of age (2) or between the ages of 60 and 64 years (3). Thus, this is not a situation where the proxy materials promulgated by the board of directors recommended the trust but failed to adequately disclose the board members' self-interest. *See Mills v. Electric Autolite Co.*, 403 F.2d 429, 435 (7th Cir. 1968), *vacated on other grounds and remanded*, 396 U.S. 375 (1970), *after remand*, 552 F.2d 1239 (7th Cir. 1977).

The court concludes as matter of law that the proxy solicitation regarding the creation of the Elders' Settlement Trust comported with applicable law and plaintiffs failed to show that the management's proxy materials made misleading statements or omitted material facts necessary in order to make the statements made not misleading.

D. The Shareholder Vote

The final issue raised is whether Sealaska obtained the requisite amount of affirmative shareholder votes for the creation of the Elders' Settlement Trust. The 1987 ANCSA amendments set forth the procedures for considering resolutions to establish settlement trusts. *See* 43

U.S.C. § 1629b. A resolution to establish a settlement trust "shall be considered approved by the shareholders of a Native Corporation if it receives the affirmative vote of shares representing – (A) a majority of the total voting power of the corporation". *Id.* § 1629b(d)(1). Section 1629b(e) states:

> For purposes of this section, the determination of total voting power of a Native Corporation shall include all outstanding shares of stock that carry voting rights except shares that are not permitted to vote on the amendment or resolution in question because of restrictions in the articles of incorporation of the corporation.

On the record date for the 1991 annual meeting, Sealaska had 1,546,198 outstanding voting shares. Affidavit of Leroy Funk, Clerk's Docket No. 28. The trust resolution received 784,107 votes or 50.7 percent of the outstanding voting shares.

Section 1629b(e) says that the "determination of total voting power of a Native Corporation shall include all outstanding shares of stock that carry voting rights except those that are not permitted to vote . . . because of restrictions in the articles of incorporation [i.e., shares held by non-Natives] . . . " Because ANCSA permits disenfranchising non-Natives with respect to deciding the issue of giving their property to elders, plaintiffs claim section 1629b violates the Equal Protection and Takings Clauses of the United States Constitution. Thus, plaintiffs argue section 1629b is void and the 30,853 non-voting shares were entitled to vote under Alaska law on the establishment of the Elders' Settlement Trust.

With respect to plaintiffs equal protection argument, federal classifications involving Indians are valid if they "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Congress amended ANCSA "to ensure the continued success of the settlement and to guarantee Natives continued participation in decisions affecting their rights and property". Act of February 3, 1988, Pub. L. 100-241, § 2, 101 Stat. 1788. Permitting only Native shareholders of a Native Corporation to vote for the creation of a settlement trust to benefit shareholders over the age of 65 years is rationally related to the fulfillment of Congress' obligation to the Natives, because it permits Natives to make decisions affecting their rights and property.

The non-Native shareholders alternative Fifth Amendment argument at least superficially presents a question of whether § 1629b works a taking of the plaintiffs' property through an adverse effect of a corporate gift upon the value of their Sealaska stock. Sealaska has not responded to this argument. The court declines to resolve this issue without further briefing.

In summary, the court concludes that the Elders' Settlement Trust is a legitimate use of the settlement trust option and that the settlement trust option could be used to benefit discrete members of a class of shareholders of a corporation established pursuant to ANCSA. The court also concludes that Sealaska's disclosures to its shareholders regarding the Elders' Settlement Trust comported with applicable law. Furthermore, restricting the shareholder vote on the trust to Native shareholders did not

violate the Equal Protection Clause of the Fifth Amendment. Finally, the court expresses no view on the Takings issue raised by plaintiffs, but requests a supplemental response by Sealaska on or before January 5, 1994, and a corresponding reply by plaintiffs on or before January 22, 1994.

DATED at Anchorage, Alaska, this 2 day of December, 1993.

/s/ H. Russel Holland
United States District Judge

cc: Fred Triem
Budd Simpson (BIRCH)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LAURIE ISAAC BROAD, et al., Plaintiffs, vs. SEALASKA CORPORATION, et al., Defendants.	No. J93-0009-CV (HRH) ORDER (Fifth Amendment Issues)

The court's order dated December 6, 1993, left open the question of whether or not the creation of the Elders' Settlement Trust pursuant to 43 U.S.C. § 1629b was an unconstitutional taking of non-Native shareholders property because of the adverse effect of a corporate transfer of funds upon the value of non-Native shareholders' Sealaska stock. The court requested a response to this issue from Sealaska. Sealaska has since responded. The plaintiffs have replied to that response.

Sealaska is the Native regional corporation for Southeast Alaska. Its shareholders are predominantly Alaska Natives of Tlingitt, Haida, and Tsimpsian descent. Sealaska was formed as part of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601-42. That Act represented "a comprehensive and final resolution of all issues relating to native land claims in Alaska" whereby "Alaska natives agreed to the extinguishment of all their claims based on aboriginal title in exchange for fee title to more than 40 million acres and a cash settlement of almost one billion dollars." *Lee v. United States*, 629

F.Supp. 721, 728 (D. Alaska 1985). Regional corporations were established to receive the monetary settlement and to maximize Native participation in decisions affecting their rights and property. *Ukpeagvik Inupiat Corp. v. Arctic Slope Regional Corp.*, 517 F.Supp. 1255, 1256 (D. Alaska 1981) *see* 43 U.S.C. § 1606 (creating regional corporations); and § 1605(c) (stating that federal monies are to be distributed among the regional corporations). Eligible Natives were given 100 shares of stock in the particular regional corporation in which they were enrolled. *See Id.* § 1606(g).

Congress has authorized Native regional corporations to create settlement trusts and fund the trusts with corporate assets. 43 U.S.C. § 1629e. In creating a settlement trust, Native corporations must follow the procedures, including voting standards, outlined by ANCSA. *See id.* § 1629b (procedures for establishing a settlement trust). The voting standards described prohibit a shareholder who is not a Native or a descendent of a Native from voting on a proposition to create a settlement trust. *See id.* § 1629b(e) (voting power of corporation for purposes of creating a settlement trust); and § 1629(h)(2)(C) (limiting voting power to Natives). In other words, ANCSA authorizes a Native regional corporation to transfer corporate assets to a settlement trust established pursuant to a shareholder vote in which only Native shareholders are entitled to vote.

Sealaska used approximately six million dollars of its assets to create a trust. Non-native Sealaska shareholders were not permitted to vote on the creation of the Elders' Settlement Trust. The non-Native shareholders say that

the use of corporate assets to create the trust amounted to a taking in violation of their Fifth Amendment rights.

The Fifth Amendment to the United States Constitution provides that private property may not be taken by the federal government for a public use without just compensation. "The purpose of forbidding uncompensated takings of private property for public use is to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

The court begins with the assumption that the use of corporate assets to create the Elders' Settlement Trust amounted to a taking of the non-voting shareholders equity in the corporation for which no compensation was provided. The non-voting shareholders can assert a constitutional right under the Fifth Amendment has been violated only if they demonstrate that Sealaska's actions in creating the trust as authorized by ANCSA § 1629b(e) constitutes government action and that the discriminatory distribution of equity to elder shareholders is a "public use" within the purview of the Fifth Amendment.

The first issue is whether the creation of the Elders' Settlement Trust by Sealaska was government action. The Supreme Court has held that "a permanent physical occupation authorized by government is a taking." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). *Loretto* involved a suit for trespass by a landlord against a cable television company for installing cable television cables pursuant to a New York law that required landlords to allow installation on their premises

in exchange for a one-time one dollar payment. *Id.* at 423. The Court allowed the Fifth Amendment taking claim against the cable company and concluded that the New York law authorizing the installation of cable television cables worked a taking of a portion of the landlord's property without just compensation. *Id.* at 441.

Section 1629b(e) allows Native corporations to create settlement trusts where authorized by a vote of Native shareholders. Sealaska created the Elders' Settlement Trust pursuant to a shareholder vote that excluded non-Natives. The trust was funded by six million dollars of Sealaska corporate assets. The net shareholder equity value of Sealaska stock necessarily decreased with the transfer of the corporate assets to the trust. Similar to the landlord in *Loretto*, those shareholders not entitled to vote can assert that § 1629b(e), which authorized the creation of the trust pursuant to a vote of only Native shareholders, effects a taking of their property right to the value of their Sealaska stock. Sealaska's actions in creating the trust as authorized by ANCSA § 1629b(e) constitutes government action for purposes of a Fifth Amendment takings claim.

The next issue is whether the taking of the shareholders property right to the value of their Sealaska stock was taken for a "public use". "[T]he scope of the 'public use' requirement of the Takings Clause is coterminous with the scope of a sovereign's police powers" and the courts must give great deference to the judgment of Congress as to what constitutes a "public use". *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (citations omitted). Further, it is not necessary that the general public benefit in order for this to be a "public use". *Id.* "So long as the

taking has a conceivable public character, the means by which it will be attained is for Congress to determine." *Id.* (citation omitted).

The creation of the Elders' Settlement Trust to benefit Sealaska shareholders over the age of 65 years is not for a "public use". Sealaska is simply taking equity from one group of shareholders and transferring it to another group of shareholders. The Elders' Settlement Trust was created from assets that belonged to all the shareholders of the corporation for the benefit of those shareholders who reach 65 years of age. It was specifically designed to benefit members of a vary narrow class of shareholders. The taking of the non-voting shareholders property right to the value of their Sealaska stock to benefit older shareholders was not a taking for a public use.

This court noted earlier the private character of the Elders' Settlement Trust in reaching its conclusion that the purpose of the Elders' Settlement Trust conformed with ANCSA. Specifically, ANCSA permitted the use of the settlement trust option "to promote the health, education, and welfare of its beneficiaries and preserve the heritage and culture of Natives." *Id.* § 1629e(b)(1). The court's December 6, 1993, Order concluded that the Elders' Settlement Trust comported with the plain meaning of ANCSA by providing for the special health and welfare needs of Sealaska's shareholders over the age of 65 years and affording a gesture of honor and respect to these shareholders in keeping with Native culture. Order, Clerk's Docket No. 63, at 9 (December 6, 1993). Health and welfare purposes sound superficially like public purposes. The court concludes, however, that Congress permitted a distinctly private use of the settlement trust

option. In this case, shareholders over the age of 65 years were benefited to the exclusion of the same class of shareholder not yet 65. Those benefits came to exist only because the Native corporation, with requisite shareholder approval, elected to create a settlement trust. This optional trust does not in any meaningful sense serve a "public" purpose.

The taking of the non-voting shareholders' property right to the value of their Sealaska stock to benefit older shareholders was not a taking for a "public use". The Elders' Settlement Trust does not violate the Fifth Amendment rights of the plaintiffs.

The plaintiffs' Motion for Summary Judgment[1] is denied. The defendants Motion for Summary Judgment[2] is granted. The clerk of court shall enter judgment dismissing plaintiffs' Complaint.

DATED at Anchorage, Alaska, this 4 day March of 1994.

/s/ H. Russel Holland
United States District Judge

cc: Fred Triem
E. Budd Simpson (BIRCH)

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[1] (Clerk's Docket No. 14).

[2] (Clerk's Docket No. 26).

FEDERAL STATUTES

Alaska Native Claims Settlement Act (ANCSA)

ANCSA § 7(h)(1)(A), [43 U.S.C. § 1606(h)(1)(A)]:

REGIONAL CORPORATIONS – SETTLEMENT STOCK –

Sec. (h)(1) RIGHTS AND RESTRICTIONS. –

(A) Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall –

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.

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§ 1629e. Settlement Trust Option

(a) Conveyance of corporate Assets –

(1) (A) A Native Corporation may convey assets (including stock or beneficial interests therein) to a Settlement Trust in accordance with the laws of the State (except to the extent that such laws are inconsistent with this section and section 1629b of this title).

(B) The approval of the shareholders of the corporation in the form of a resolution shall be required to

convey all or substantially all of the assets of the corporation to a Settlement Trust. A conveyance in violation of this clause shall be void ab initio and shall not be given effect by any court.

(2) No subsurface estate in land shall be conveyed to a Settlement Trust. A conveyance of title to, or any other interest in, subsurface estate in violation of this subparagraph shall be void ab initio and shall not be given effect by any court.

(3) Conveyances made pursuant to this subsection –

(A) shall be subject to applicable laws respecting fraudulent conveyance and creditors rights; and

(B) shall give rise to dissenters' rights to the extent provided under the laws of the State only if the rights of beneficiaries in the Settlement Trust receiving a conveyance are inalienable.

(4) The provisions of this subsection shall not prohibit a Native Corporation from engaging in any conveyance, reorganization, or transaction not otherwise prohibited under the laws of the State or the United States.

(b) Authority and Limitations of a Settlement Trust

(1) The purpose of a Settlement Trust shall be to promote the health, education, and welfare of its beneficiaries, and preserve the heritage and culture of Natives. A Settlement Trust shall not –

(A) operate as business

(B) alienate land or any interest in land received from the settlor Native Corporation (except if the recipient of the land is the settlor corporation); or

(C) discriminate in favor of a group of individuals composed only or principally of employees, officers or directors of the Native Corporation.

An alienation of land or an interest in land in violation of this paragraph shall be void ab initio.

(2) A Native Corporation that has established a Settlement Trust has exclusive authority to –

(A) Appoint the trustees of the trust

(B) Remove trustees of the trust for cause

Only a natural person shall be appointed a trustee of a Settlement Trust. An appointment or removal of a trustee in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(3) A Native Corporation that has established a Settlement Trust may expand the class of beneficiaries to include holders of Settlement Common Stock issued after the establishment of the trust without compensation to the original beneficiaries.

(4) A Settlement Trust shall not be held to violate any laws against perpetuities

(c) Savings –

(1) The provisions of this chapter shall continue to apply to any land or interest in land received from the Federal Government pursuant to this chapter and later

conveyed to a Settlement Trust as if the land or interest in land were still held by the Native Corporation that conveyed the land or interest in land.

(2) No timber resources subject to section 1606(i) of this title conveyed to a Settlement Trust shall be sold, exchanged, or otherwise conveyed except as necessary to –

(A) dispose of diseased or dying timber or to prevent the spread of disease or insect infestation;

(B) prevent or suppress fire; or

(C) ensure public safety.

The revenue, if any, from such timber harvests shall be subject to section 1606(i) of this title as if such conveyance had not occurred.

(3) The conveyance of assets (including stock or beneficial interests) pursuant to subsection (a) of this section shall not affect the applicability or enforcement (including specific performance) of a valid contract, judgment, lien, or other obligation to which assets, stock, or beneficial interests were subject prior to conveyance

(4) A claim based upon paragraph (1) (2) or (3) shall be enforceable against the transferee Settlement Trust holding the land, interest in land, or other assets (including stock or beneficial interests) in question to the same extent as such claim would have been enforceable against the transferor Native Corporation, and valid obligations arising under section 1606(i) of this title as well as claims with respect to a conveyance in violation of a valid contract, judgment, lien, or other obligation shall also be enforceable against the transferor corporation.

(5) Except as provided in paragraphs (1), (2), (3), and (4), once a Native Corporation has made, pursuant to subsection (a) of this section, a conveyance to a Settlement Trust that does not –

(A) render it –

(i) unable to satisfy claims based upon paragraph (1), (2), or (3); or

(ii) insolvent; or

(B) occur when Native Corporation is insolvent;

the assets so conveyed to the Settlement Trust shall not be subject to attachment, distraint, or sale on execution of judgment or other process or order of any court, except with respect to the lawful debts or obligations of the Settlement Trust.

(6) No transferee Settlement Trust shall make a distribution or conveyance of assets (including cash, stock, or beneficial interests) that would render it unable to satisfy a claim made pursuant to paragraph (1), (2), or (3). A distribution or conveyance made in violation of this paragraph shall be void ab initio and shall not be given effect by any court.

(7) Except where otherwise expressly provided, no provision of this section shall be construed to require shareholder approval of an action where shareholder approval would not be required under laws of the State.

(Pub.L. 92-203. § 39, as added Pub. L. 100-241, § 10, Feb. 3, 1988, 101 Stat. 1805.)

ALASKA STATUTES

AS 10.06.960. Corporations organized under Alaska Native Claims Settlement Act.

(f) Notwithstanding the other provisions of this chapter, a corporation organized under the act is governed by the act to the extent the act is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by the act, and the action is considered to be approved and adopted if approved under the act. An amendment approved under the act and delivered to the commissioner under AS 10.06.512 shall be filed by the commissioner under AS 10.06.910, and a certificate of amendment shall be issued.

(i) In this section, "act" means 43 U.S.C. 1601 – 1629e (Alaska Native Claims Settlement Act).